

MINUTES OF COMMISSION MEETING

October 17, 2019

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn (via telephone); Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Professor John K. Cornwell (via telephone), of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang.

Guests

Professor Jon Romberg, of the Seton Hall University School of Law, and David McMillin, Director of Legal Services of New Jersey, were present at the meeting.

Minutes

On the motion of Commissioner Rainone, which was seconded by Commissioner Bell, the Minutes from the September 19, 2019, meeting were unanimously approved by the Commission.

Standard Form Contract

John Cannel discussed with the Commission a Draft Final Report on Standard Form Contracts, the Appendix of which had been modified in response to concerns previously raised by the Commission and commenters. Mr. Cannel advised the Commission that Staff had been in communication with the commenters during the preparation of the Final Report, in an effort to address their concerns with additional drafting.

Chairman Gagliardi noted that the Commission received a Memorandum of Concern from Seton Hall Professors Charles A. Sullivan and Jon Romberg. Chairman Gagliardi observed that Professor Romberg and David McMillin, the Director of Legal Services New Jersey, were present at the meeting.

Professor Romberg advised the Commission that the Memorandum of Concern sets forth the general perspective and background on which his objection is based and indicated that he would simply summarize and highlight certain concerns more fully expressed in the Memorandum. He stated that the that the Draft Final Report is based upon a proposition that is unconvincing; the proposition that standard form contract terms are irrelevant. He continued that it is not necessarily true that neither party has the power to change the contract in the typical standard form contract

setting. Professor Romberg noted that the imbalance of power is an important element to understand and resolve these disputes.

The Draft Final Report, Professor Romberg continued, also conflicts with current New Jersey law and the work of the American Law Institute (ALI). Professor Romberg stated that the Draft Final Report favors clarity, certainty and business interests over the interests of the consumers. The common law, according to Professor Romberg, does not support this dynamic. In addition, the definitions of primary and secondary terms as set forth in the Report are not clear and will ultimately lead to litigation to settle the meaning of these terms.

Professor Romberg discussed the case of *Ahern v. Knecht*, 563 N.E.2d 787 (1990), with the Commission. In *Ahern*, the plaintiff was dramatically over-charged for the repair of her air conditioning unit during dire circumstances. This case brought to the fore the issue of unconscionability. The extreme power imbalance in this case demonstrates that an extreme power imbalance might rise to the level of unconscionability. According to Professor Romberg, the current sliding scale approach for dealing with standard form contract cases works. Professor Romberg then asked the Commission to wait for the ALI to act on this subject, even if it takes several years.

Chairman Gagliardi asked Professor Romberg how long it takes for the ALI to act on a given project. David McMillin noted that the ALI has approved the scope of the standard form contract project and has tabled the rest of the discussion on the topic. Professor Romberg stated that there is no current time table for the standard form contract project.

David McMillin advised the Commission that this project represents a radical change to the doctrine of unconscionability and will adversely affect low income individuals. The term “fully negotiated” is a term that Mr. McMillin believes will have to be litigated to determine its meaning. In addition, contracts involving health care, negative amortization, and personal installment loans will all be affected by the changes made in the Draft Final Report.

Although the Report preserves the traditional, common law defenses, Professor Romberg advised the Commission that it will overturn the current common law promulgated by the New Jersey Supreme Court. Since 1992, courts have examined several factors in order to determine whether a contract is unconscionable. Mr. McMillin then read to the Commission from correspondence that he received from Professor Jacob Hale Russell, who supports the current use of unconscionability in standard form contract disputes.

Mr. Cannel advised the Commission that Staff has taken steps to respond to the concerns of the commenters by refining the distinction between primary and secondary terms. He continued that the Draft Final Report is not anti-consumer; rather, the modifications proposed in this Report strengthens a consumer’s ability to litigate secondary terms.

Commissioner Rainone commented that unconscionability serves as a deterrent, even if it is not a successful argument. The problem in these types of cases is typically price gouging. He questioned whether the removal of this deterrent would open the floodgates to predatory sellers. Mr. Cannel responded that a plaintiff can still litigate secondary terms and that the modifications set forth in this project do not displace an individual's ability to pursue consumer fraud claims. He also noted that certain contracts, such as those involving real estate, are not within the scope of the project and therefore would not be impacted.

Commissioner Cornwell stated that he did not believe that this was the right time for the Commission to consider this project. Commissioner Bell noted that the term "consumer" and "retailer" could be changed to the term "parties." He also questioned why a plaintiff should have to prove a contract of adhesion. Instead, he continued, the focus of the litigation should be whether the terms were substantively unconscionable. Commissioner Bell noted that he would like to think about the "price term" and whether medical services should be excluded from standard from contracts.

Commissioner Bunn agreed with Commissioner Bell that this project has several good elements. Commissioner Bunn also stated that the terms in section 11, dealing with attorney fees, might not work in multistate use. Mr. Cannel advised that this problem can be addressed by drafting. Commissioner Bell asked Staff to take out the word secondary. Commissioner Rainone asked Staff to consider using parallel language by adding the term "reasonable" before the phrase "attorney fees." Finally, Commissioner Bunn asked Staff ensure that the fee cap is drafted to apply equally to both plaintiffs and defendants.

Chairman Gagliardi noted that this project involves significant issues on which the Commission's scholarship adds value to the debate. He said that the Legislature may benefit from the work of the Commission, and he does not favor terminating this project. He asked Mr. Cannel to draft a Memorandum setting forth the "talking points" raised by the commenters and the Commissioners. After the Commission has had the opportunity to review this Memorandum, the Commission will provide him with guidance. Commissioner Bell asked Mr. Cannel to address the facts in *Ahern v. Knecht*.

Definition of "Actor"

Samuel Silver discussed with the Commission a Draft Final Report concerning the definition of "actor" in the context of the DNA tolling provision in the Code of Criminal Justice. This project was brought to the Commission's attention after a review of the New Jersey Supreme Court decision in the consolidated cases of *State v. Twiggs* and *State v. Jones*, 233 N.J. 513 (2018). Mr. Silver noted that both cases involved defendants who were inculpated by a co-defendant identified by DNA evidence.

The New Jersey Supreme Court determined that the Legislature intended the DNA tolling provision to apply solely to the actor the DNA directly identifies. Mr. Silver explained the language

set forth in the Appendix was provided by Commissioner Long after the May 2019 Commission meeting. At the June 2019 meeting, the Commission authorized release of a Tentative Report that contained the proposed modifications recommended by Commissioner Long.

The Draft Tentative Report was sent to forty-two stakeholders including prosecutors, law enforcement, the Attorney General, the Public Defender, and private defense attorneys. No objection was received by this project. Mr. Silver then requested that the project be released as a Final Report.

Commissioner Bunn mentioned that the draft language was well written and accomplishes its goal. On the motion of Commissioner Rainone, which was seconded by Commissioner Cornwell, the Commission voted unanimously to release the project as a Final Report.

Bail Jumping

Samuel Silver presented a Draft Tentative Report proposing modifications to New Jersey's bail jumping statute, N.J.S. 2C:29-7, based on the Appellate Division's decisions in *State v. Morris*, 2018 WL 4201675 (2018) and *State v. Emmons*, 397 N.J. Super. 112 (2007).

Mr. Silver stated that, in its current form, New Jersey's bail jumping statute raises two specific issues. First, the affirmative defense in the bail jumping statute requires that a defendant prove the same fact that the State is required to prove as an element of the offense - knowingly. Second, as discussed in *State v. Morris*, there is a question regarding whether a defendant should be convicted of bail jumping if he or she appears in court on the date and time specified, but leaves the courthouse before his or her matter has been addressed by the court.

In *State v. Emmons*, the defendant failed to appear for trial and became a fugitive for a year; he subsequently pled guilty to the substantive charge but appealed his conviction for bail jumping. The Appellate Division reversed the trial court's decision and remanded the bail jumping conviction. It ruled that the affirmative defense is unconstitutional, reasoning that there is an inference created that the defendant must reveal his lawful excuse for not appearing or be found guilty, in violation of the Fifth Amendment. As well, the State must prove that defendant knowingly failed to appear by a reasonable doubt, but a defendant must prove that he or she knowingly failed to appear by a preponderance of the evidence.

Since the decision in *State v. Emmons*, trial courts have been forbidden from charging the jury with the statutory language. To address this, Mr. Silver created a new section, N.J.S. 2C:29-7(b), which removes the burden on the defendant to prove the affirmative defense.

In *State v. Morris*, the defendant appeared in court after being released on bail. The judge ordered the defendant to be drug tested by his probation officer that afternoon and to return to court after testing. The defendant failed to reappear, and subsequently was arrested on an open bench

warrant. The trial court dismissed the bail jumping charges, but the Appellate Division disagreed, stating that the defendant must appear.

In response to the Appellate Court decision, Staff proposed amendments to the current bail jumping statute. Rather than a single paragraph, the statute was broken into lettered and numbered subsections. These subsections provide that an individual commits an offense if he, or she: (1) fails to appear at the time and place specified by the Court; (2) fails to remain to satisfy the purpose of the court appearance; or, (3) takes leave of court without having been dismissed by the judge.

Commissioner Bell posited that an individual could be out on bail for one offense and then fail to appear in court on a second, unrelated, offense or violation. As drafted, it appears that the second failure to appear could result in a bail jumping charge for the first offense. In response, Mr. Silver suggested modifying the statutory language to substitute “any offense” with the phrase “the underlying offense.” Chairman Gagliardi asked that Staff replace the word “that” with the word “what” in the first sentence of page four.

A motion to release the Tentative Report with the recommended changes was made by Commissioner Bell, seconded by Commissioner Rainone, and unanimously approved by the Commission.

Charitable Registration and Investigation Act

Samuel Silver discussed with the Commission a Draft Tentative Report to modify the Charitable Registration Investigation Act (CRI) to include: certain defined terms; additional exemptions for governmental entities and certain fiduciaries; the requirement that registrants report their involvement in criminal or civil proceedings to the Attorney General; and modernization of the Act to account for technological advancements. The issue was brought to the attention of the Commission after a review of the Model Protection of Charitable Assets Act.

Mr. Silver stated that the purpose of the CRI is to protect the public from fraud and deception and to allow the Attorney General of New Jersey to gather information of individuals and organizations that are involved in fundraising activities.

Before the adoption of the CRI, New Jersey fundraising activity was regulated by the Charitable Fundraising Act of 1971. The Act was repealed in 1994 and replaced with the CRI. The CRI allows the Attorney General to collect information and disseminate it to the public, as well as act against fundraisers who abuse the public interest.

Mr. Silver explained that Staff performed a side by side comparison with the Model Protection of Charitable Assets Act and the CRI. As a result of this comparison, Staff determined that there were sections of the CRI that could benefit from provisions contained in the Model Act. Amendments to the CRI included modification of: reportable events; actions and proceedings that affect the assets, structure or governance of a charitable organization; and exemptions for

individuals or organizations that are not required to register under this Act. Further, Mr. Silver noted that the purpose of the Act was to provide the Attorney General with information concerning the charitable assets of an entity before they disappear or before any negative consequence occurs.

Commissioner Bunn explained that receiving input from the Attorney General's office and the non-profit community would be vital to the project. He mentioned that outreach needs to be done because of the possibility of inconveniencing non-profit organizations. Chairman Gagliardi agreed.

On the motion of Commissioner Bell, which was seconded by Commissioner Cornwell, the Commission unanimously voted to release the project as a Tentative Report.

Local Lands and Building Laws

An attorney who practices both local land and building law and local public contracts law asked Staff to examine the statutes that permit a county or municipality to lease property to a private person. Samuel Silver discussed with the Commission a Draft Tentative Report recommending modifications to Local Land and Buildings Law ("LLBL") on this subject.

Currently, there are two separate statutes that permit a governmental unit to lease public property not needed for public use to private persons. Mr. Silver advised the Commission that N.J.S. 40A:12-14 and N.J.S. 40A:12-24 were both enacted on the same day and permit governmental units to lease public property not needed for public use to private persons. The express language contained in §14 that requires the governmental unit to engage in the public bidding process is absent from §24.

Mr. Silver noted that in *Sellitto v. Borough of Spring Lake Heights*, the Appellate Division was confronted with these two controlling, but contradicting, statutes contained within the LLBL. Ultimately, the Court concluded that in order to preserve the public bidding requirements of the local public contracts law in the context of the leasing of public lands and buildings, §14 prevails over §24. Mr. Silver noted that the Court could not ascertain what purpose §24 serves in the current statutory scheme.

Initial outreach to the stakeholder who initiated the project allowed Staff to incorporate their preliminary modifications to the statutes. Mr. Silver suggested that the release of the project as a Tentative Report would allow the Commission to receive input from a broad range of stakeholders.

Commissioner Rainone noted that county governments typically act by resolution and municipalities act by way of ordinances. He asked Mr. Silver to review the statute to confirm that the governing mechanism referenced is used consistently throughout the proposed modification. Mr. Silver confirmed that he would review the proposed statutory amendments in accordance with the Commissioner's recommendation.

Subject to the request of Commissioner Rainone and on the motion of Commissioner Bell, which was seconded by Commissioner Rainone, the Commission unanimously moved to release the project as a Tentative Report.

Books and Records of Account

After reviewing the Appellate Division decision of *Feuer v. Merck & Co., Inc.*, Mark Ygarza prepared a Memorandum that examined the definition of “books and records of account” as used in N.J.S. 14A:5-28. This Memorandum focused on whether a shareholder is entitled to all records pertaining to a transaction of a corporation, or only the financial records.

In *Feuer*, the Plaintiff sought the production of twelve broad categories of documents from Merck. In response, the Board appointed a “Working Group” to evaluate these demands, retain counsel, investigate, and recommend a response related to the acquisition of the pharmaceutical firm. The Working Group then informed the Plaintiff that it rejected all of his demands, pursuant to its “business judgment rule.” In response, the Plaintiff demanded the documents that were the basis for the complaint. He described twelve categories of “Merck’s Books and Records” pertaining generally to the Working Group’s activities, communications, and formation; documents provided to the Board regarding Cubist and two of its drugs before Merck’s tender offer; and the Board’s consideration of Plaintiff’s demands and the Working Group’s recommendations. The trial court determined that Plaintiff had a “proper purpose” under N.J.S. 14A:5–28 in seeking the documents but that the documents Plaintiff sought fell outside “books and records of account.” Plaintiff appealed the trial court’s decision and argued that N.J.S. 14A:5-28(4) entitled him to the documents that Merck withheld.

The Appellate Division examined the use of the phrase “books and records of account” as it is used in other jurisdictions. In Pennsylvania, the term ‘books and records of account’ does not encompass any and all records, books, and documents of a corporation. Additionally, the Court looked at Missouri’s law and found that the phrase was even more narrow than the shareholder argued. The Court in Missouri ruled that the phrase did not connote “inter-office communications.” In the absence of a statutory definition, the Appellate Division consulted Black’s Law Dictionary to ascertain the regular definition of “books and records of account.” The legal dictionary defines the phrase “books of account” with “shop books,” which are “[r]ecords of original entry maintained in the usual course of a business by a shopkeeper, trader or other business person.

The Court also analyzed the structure of the New Jersey statute, noting that the phrase appears in both the first paragraph and the fourth of N.J.S. 14A:5-28. The Court said that if the Legislature used the phrase in one subsection then the phrase should equate the same meaning in the other subsection. Mr. Ygarza suggested that reading the statute sensibly does not impose such a vaguely defined record-keeping obligation on corporations, nor does it grant courts the power to grant an equally vague scope of inspection to shareholders. Since the Legislature used “books”

and “records” in subsection four’s third sentence and does not include “of account” as in the first sentence, the Court held that this must be taken as a purposeful decision by the Legislature.

Although there have been several amendments to the statute since its enactment, Mr. Ygarza confirmed that neither of the amendments addressed the definitions or the clarifications of “books and records of account.” In addition, Mr. Ygarza advised the Commission that there is no pending legislation on the subject of “books and records of account”.

The Commission authorized Staff to proceed with further research and outreach in this area.

Preemption

Arshiya Fyazi discussed with the Commission a Memorandum proposing a project to modify section (e) of N.J.S. 54:10A-5a in response to the discussion of federal preemption in *Stanislaus Food Prod. Co. v. Dir., Div. of Taxation*, No. 011050-2017, 2019 WL 2720346 (N.J. Tax, June 28, 2019).

Ms. Fyazi briefly provided the Commission with the history of the business tax. She stated that in 1945, New Jersey enacted the Corporation Business Tax (“CBT”). The CBT is a tax based solely on a corporation’s net worth which was allocated to New Jersey. In 1958, the statute was amended to tax corporations based on net income allocable to New Jersey. Congress then enacted the Interstate Income Act of 1959 (“IIA”), that included minimum standards that prevent a state from imposing “Net Income Tax” on interstate commerce if the only in-state activities are limited to the solicitation of orders of tangible personal property which are approved or rejected outside of the state. Under the Act, “Net Income Tax” is defined as “any tax imposed on, or measured by, net income.”

In 2002, New Jersey enacted the first phase of the AMA (Alternative Minimum Assessment) applicable to all corporate taxpayers. It required corporations to pay the greater of either CBT (tax on net income allocated to the state) or the AMA – (tax on gross profits or gross receipts). In 2006, New Jersey implemented the second phase of the AMA. This second phase allowed for an assessment on gross receipts or gross profits tax, solely on entities that are exempt from paying the CBT under the IIA. If the IIA entity consents to CBT tax on New Jersey, it will not be taxed under the AMA. The interplay between the second phase of the AMA and the IIA raised the issue of preemption in *Stanislaus*.

In *Stanislaus*, the Stanislaus Food Products Company “taxpayer” was based in California. The taxpayer grew produce that was shipped to an independent distributor in New Jersey who then sold the vegetables directly to restaurants. Initially, the taxpayer filed its returns and paid the CBT based upon its net income. The taxpayer subsequently filed amended returns and indicated that it qualified as an IIA taxpayer. The Director agreed and allowed a refund of the CBT, but imposed

the AMA gross profits tax, which reduced the amount of the refund. The taxpayer appealed to the Tax Court and claimed protection under the IIA.

The Tax Court examined whether New Jersey's AMA is pre-empted by the Supremacy Clause of the United States Constitution, because it conflicts with the Congress' Commerce Clause powers to regulate interstate commerce. The Supremacy Clause of the United States Constitution provides a rule for courts to follow when federal and state law are in conflict. The Court examined both Express and Conflict preemption.

Express preemption, according to Ms. Fyazi, occurs when Congress explicitly indicates through statutory language what type of state law the enactment is attempting to preempt. The Tax Court found that the AMA expressly conflicts with IIA because it specifically targets IIA entities. Conflict preemption occurs when it is impossible for a party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the objectives of Congress.

In certain situations, the AMA is more financially demanding than the CBT, so taxpayers that would have ordinarily been exempt from the CBT end up paying the AMA. The Court also looked at the legislative intent of implementing the second phase of the AMA. The Legislative statements by the Assembly Budget Committee and State Budget Appropriation Committee indicated that it was to "effectively capture the value of the activities in New Jersey of out-of-state companies that receive exemption from a tax, like CBT." Based on its analysis, the Tax Court determined that the AMA is preempted by the IIA.

Ms. Fyazi requested authorization to conduct additional research and outreach regarding this issue in order to determine whether it is possible to modify the AMA to be consistent with the federal statute or whether some other action or recommendation would be appropriate.

Commissioner Bunn commented that the United States Supreme Court decision in *South Dakota v. Wayfair*, a case regarding taxes on internet sales, may set boundaries for the Commission's work in this area. He also noted that there is an abundance of activity in this area. As an initial matter he asked Staff to determine whether another entity, such as the Department of the Treasury, is already working on this issue. Commissioner Rainone added that the State Budget should be examined when working in this area of law.

The Commission authorized Staff to proceed with further research and outreach in this area.

Definition of Award

Jennifer Weitz discussed with the Commission a Memorandum regarding whether monies recovered by a relator, a *qui tam* plaintiff, are considered an award, and therefore taxable, under the state's Gross Income Tax Act, N.J.S. 54A:5-1(1). This project was brought to the

Commission's attention after Staff read the Appellate Division decision in *Kite v. Director, Division of Taxation*, 453 N.J. Super. 146 (App. Div. 2018). Preliminary work on this matter was done by Ryan Schimmel, a Legislative Intern.

In *Kite*, the Plaintiff was performing financial consulting services for several hospitals when he uncovered a pattern of fraud. After compiling evidence, he filed a *qui tam* lawsuit under the False Claims Act, 31 U.S.C.A. § 3729 et. seq., in U.S. District Court for the District of New Jersey. The United States Department of Justice opted to intervene and prosecute his action, and revealed similar allegations made in two other complaints, filed by other relators. Kite and the additional relators executed an agreement to advance all three lawsuits and share any monies recovered.

The federal government recovered \$4.93 million from defendants, and Kite was paid \$1,229,225. The shares payable to other relators, and legal fees, were deducted from the recovery received by Kite. Kite reported the full share on his federal income taxes and was able to deduct his legal fees. He did not, however, report the amount on his state income taxes. The State Division of Taxation (the "Division") informed Kite of the deficiency and informed him that the money was taxable as a "prize or award" pursuant to N.J.S. 54A:5-1(1). The Division also disallowed deductions for attorney's fees and distributions to the other relators. In response, Kite filed a protest with the Division. After an administrative conference, the Division upheld the assessment. As a result, with interest, Kite owed \$124,476.

The Appellate Division examined the plain language of the statute and upheld the trial court's decision that an award includes any monies a person receives as damages in a lawsuit. The Court also noted that both the False Claims Act and the relators' sharing agreement refer to a recovery in a *qui tam* action as an "award."

Ms. Weitz informed the commission that S784/A3614 were introduced in the current legislative session. These bills were intended to provide a gross income tax exclusion for attorney's fees and costs received in connection with certain unlawful discrimination or unlawful retaliation claims or actions. Although the Senate version passed both houses of the Legislature, the bill was vetoed by the Governor in January of 2019.

Chairman Gagliardi expressed concern that the Legislature has very recently had the opportunity to work in this area, and they declined to address the issue of the definition of award. Commission Rainone joined in the Chairman's statements and added that he was concerned about the policy aspects of the potential project. Commissioner Bell said that he believed that this was a terrible decision, and one that weakens the public's ability to be protected from fraud. Commissioner Bunn stated that if the term award is defined as the "net amount recovered" that might be contrary to the work of the Legislature. Commissioner Cornwell noted that he would not object to narrowing the scope of the project to define the term "award" while acknowledging that

this would not be an easy task. Ultimately, a majority of the Commissioners present determined that Staff would not undertake work in this area.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, which was seconded by Commissioner Rainone.

The next Commission meeting is scheduled to be held on November 21, 2019, at 10 a.m.